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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

17

18 IN RE APPLE & AT&TM ANTITRUST) Master File No. C 07-05152 JW
19 LITIGATION)
20)
21)
22) File No. C 08-948 JSW
23 HERBERT H. KLIEGERMAN on behalf of)
himself and others similarly situated,)
24 Plaintiff,)
25 v.)
26 APPLE INC. and AT&T MOBILITY LLC,)
27 Defendant.)
28)

) **HERBERT H. KLIEGERMAN'S
SUPPLEMENTAL MEMORANDUM OF
LAW IN FURTHER SUPPORT OF HIS
MOTION FOR APPOINTMENT OF
INTERIM LEAD CLASS COUNSEL**

) DATE: April 7, 2008
)) TIME: 9:00 a.m.
)) CRTRM: 8
)) JUDGE: Hon. James Ware

1 Plaintiff Herbert H. Kliegerman respectfully submits this supplemental memorandum of
 2 law in further support of his motion to appoint Wolf Haldenstein Adler Freeman & Herz LLP
 3 ("Wolf Haldenstein") as interim lead class counsel for the Classes in these consolidated actions.

4 **I. ARGUMENT**

5 **A. Wolf Haldenstein Is Best Qualified To Fairly And
 6 Adequately Represent The Interests Of The Classes**

7 When competing law firms seek to be appointed as interim lead class counsel, the Court
 8 must appoint the firm that is best qualified to represent the interests of the class. Fed. R. Civ. P.
 9 23(g)(2)(B) ("...the court must appoint the applicant best able to represent the interests of the
 10 class."). The papers submitted in support of the competing motions for appointment of interim
 11 lead class counsel convincingly demonstrate that Wolf Haldenstein is the firm best able to conduct
 12 this litigation on behalf of the Classes. None of the other firms seeking appointment as interim
 13 lead class counsel can match Wolf Haldenstein's lengthy experience, none of them can match
 14 Wolf Haldenstein's demonstrated leadership capabilities, and none of them can match Wolf
 15 Haldenstein's extensive resources with which to conduct the litigation.

16 As Plaintiff Kliegerman already explained in his opening brief, Wolf Haldenstein is fully
 17 able and committed to staff and finance this action. As a national law firm with offices in New
 18 York, San Diego, and Chicago, Wolf Haldenstein is widely recognized for its successful
 19 prosecution of many of the largest and most complex class actions in courts throughout the United
 20 States. Many of those cases were large antitrust class actions similar to this litigation. With more
 21 than 50 attorneys practicing in all areas of the law, including 35 attorneys and 10 paralegals in its
 22 Class Action Litigation Group, Wolf Haldenstein has more resources to devote to this case than all
 23 of the other moving firms combined. *See* Wolf Haldenstein's firm resume (attached as Exhibit 1
 24 to the Affidavit of Alexander H. Schmidt in Support of Plaintiff Kliegerman's Cross-Motion for
 25 Appointment of Interim Lead Class Counsel, filed with the Court on March 3, 2008). Wolf
 26 Haldenstein is so undeniably qualified to conduct this litigation on behalf of the Classes that none
 27 of the other movants have even attempted to argue otherwise.

28 Moreover, Wolf Haldenstein already has expended considerable resources to identify,
 29 investigate, and plead claims on behalf of the Classes in this action, and it will continue to do so.

1 Wolf Haldenstein's efforts to date include drafting Plaintiff Kliegerman's Amended Complaint,
2 that was filed in the Southern District of New York on November 16, 2007, communicating with
3 defense counsel for both Apple and AT&T, entering into a stipulation with both defendants
4 extending their time to appear, move or otherwise respond, and consenting to the transfer of the
5 case to this Court. Additionally, in an effort to conserve judicial resources, Plaintiff Kliegerman
6 moved to have his Action related to the instant Action. Thus, Wolf Haldenstein has demonstrated
7 its commitment to the efficient and successful prosecution of this action on behalf of the Classes.

B. The Other Movants Are Not As Well Qualified To Serve As Interim Lead Class Counsel

10 By sharp contrast, the other firms seeking appointment as interim lead class counsel have
11 comparatively little antitrust class action experience, fewer resources, and cannot boast nearly the
12 same history of success as Wolf Haldenstein.

1. The Law Office of Damian Fernandez Is Not As Well Qualified To Serve As Interim Lead Class Counsel

14 The moving papers demonstrate that the Law Office of Damian Fernandez does not have
15 the same experience or nearly the same resources as Wolf Haldenstein, and therefore should not be
16 appointed interim lead class counsel in this action.

17 The Law Office of Damian Fernandez, which relies on the services of only one attorney –
18 Mr. Fernandez himself – is out of its element in the area of complex class action litigation that is
19 required to prosecute the instant action. Mr. Fernandez, who graduated law school in 1999, has
20 only 8 years of litigation experience. He does not claim to have *any* experience in class actions,
21 complex litigation, or antitrust actions. Furthermore, given his status as a solo practitioner, it is all
22 but certain that Mr. Fernandez does not have sufficient resources to prosecute this Action against
23 the formidable legal team that defendants have hired to work on this case.

24 Mr. Fernandez had moved with the law firm of Girard Gibbs as interim co-lead class
25 counsel. Girard Gibbs – which did not appear in the case before moving for appointment as
26 interim co-lead class counsel with Mr. Fernandez and did nothing in the case other than move for
27 appointment as interim co-lead class counsel – has withdrawn or soon will withdraw as counsel.
28 Therefore, Mr. Fernandez cannot rely upon them to assist him in the prosecution of the Action.

2. Max Folkenflik Is Not As Well Qualified To Serve As Interim Lead Class Counsel

Max Folkenflik, of the two-person law firm of Folkenflik & McGerity, also lacks both the experience and the resources necessary to adequately represent the Classes of plaintiffs in this case.

It is clear that Mr. Folkenflik, with only a two-person office located in New York City, does not have the resources necessary to take on the sophisticated legal team being proffered by the defendants in California in this case. Certainly, Mr. Folkenflick's small firm does not have nearly the same level of professional or support staff capabilities, or infrastructure as Wolf Haldenstein. In addition to lacking the resources necessary to prosecute this action, Mr. Folkenflik proffers inadequate evidence of the relevant experience necessary to be appointed interim lead class counsel.

Specifically, in his motion to be appointed interim lead class counsel, Mr. Folkenflik purports to have significant technological, legal, and complex litigation experience. The bulk of his experience in the area of antitrust litigation comes from working on three cases while he was an associate at Cravath, Swaine and Moore, approximately 25 years ago. Declaration of Max Folkenflik in Support of Motion to Appoint Max Folkenflik As Lead Counsel for Plaintiffs and the Putative Class, ¶12, filed on March 3, 2008. Mr. Folkenflick does not claim any antitrust experience, and certainly no leadership roles in any antitrust litigation, for the past 25 years.

Additionally, the majority of Mr. Folkenflik's "technological" and "complex litigation" experience comes from his role in the case of *Hoffman v. American Express*, No. 2001-22881 (Cal. Super. Ct., Alameda County, filed 2001), a case which is currently still pending in Alameda County, California. As proof of his experience in these areas, Mr. Folkenflik offers testimonials from Joseph Caruso and Ronald M. Sabraw to vouch for his experience. Mr. Caruso, who is obviously conflicted by the fact that he is currently assisting Mr. Folkenflik in the prosecution of this Action, asserts that Mr. Folkenflik has significant technological expertise. Declaration of Joseph Caruso in Support of Motion to Appoint Max Folkenflik as Lead Counsel for Plaintiffs and the Putative Class, ¶1, filed on March 3, 2008. While Mr. Folkenflick may have some technological expertise, he seeks appointment as interim lead class *counsel*. Apart from the

1 conflicted position Mr. Caruso occupies, his affidavit sheds no light on Mr. Folkenflick's ability to
 2 serve in that legal capacity. Moreover, the technological expertise that Mr. Folkenflick claims to
 3 have consists largely of his work on cases that involved significant document databases. As such,
 4 his technological expertise is no greater than Wolf Haldenstein's own experience in cases
 5 involving databases with tens (or even hundreds) of millions of pages of documents and other
 6 data.

7 Mr. Folkenflick also offers the affidavit of Former Judge Sabraw, a former state court
 8 judge who presided over the *Hoffman* case, No. 2001-22881, which is still pending. *See*
 9 Declaration of Ronald M. Sabraw in Support of Motion to Appoint Max Folkenflik as Lead
 10 Counsel for Plaintiffs and Putative Class, ¶2, filed on March 3, 2008. His Declaration is, to say
 11 the least, highly unusual. Former Judge Sabraw attests to Mr. Folkenflik's skill in one case.
 12 However much success Mr. Folkenflick ultimately may achieve for the class in *Hoffman v.*
 13 *American Express*, the opinion of a former judge of his performance in that lone case does not
 14 begin to approach Wolf Haldenstein's successful record over the past forty years. While Mr.
 15 Folkenflick has submitted an affidavit from a former judge in one case, Wolf Haldenstein has
 16 submitted more than a dozen opinions by judges acting in their official capacity praising the firm
 17 for its skillful and effective advocacy on behalf of numerous classes of victims of antitrust
 18 violations, securities fraud, and other corporate wrongdoing.

19 Neither 25-year old antitrust experience as an associate at a large law firm nor one
 20 technologically demanding case that is still pending in the California state court makes Mr.
 21 Folkenflik the most qualified interim lead class counsel. He has neither the resources nor the
 22 experience that Wolf Haldenstein has, and thus should not be appointed as interim lead class
 23 counsel in this action.

24 **II. CONCLUSION**

25 For these additional reasons, Plaintiff Kliegerman respectfully requests that the Court grant
 26 the motion to appoint Wolf Haldenstein as interim lead class counsel and to deny the competing
 27 cross-motions of Mr. Fernandez and Gerard Gibbs and of Mr. Folkenflick for appointment as
 28 interim lead class counsel.

1 DATED: March 17, 2008

Respectfully Submitted,
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APPLE:15917

DECLARATION OF SERVICE

I, MARTA STASIK, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 750 B Street, Suite 2770, San Diego, California 92101.

2. That on March 17, 2008, declarant served the following document

**HERBERT H. KLEIGERMAN'S SUPPLEMENTAL MEMORANDUM OF
LAW IN FURTHER SUPPORT OF HIS MOTION FOR APPOINTMENT
OF INTERIM LEAD CLASS COUNSEL**

via the CM/ECF system to the parties listed on the attached service list.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of March 2008, at San Diego, California.

Marta Stasik
MARTA STASIK

APPLE ANTITRUST

Service List – February 13, 2008

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